BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTINE L. FOLSOM	)	
Claimant	)	
	)	
VS.	)	
	)	
MEDICALODGES, INC.	)	
Respondent	)	Docket No. 1,023,060
	)	
AND	)	
	)	
TRAVELERS PROPERTY CASUALTY	)	
COMPANY OF AMERICA	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the June 18, 2008 Award by Administrative Law Judge (ALJ) Steven J. Howard. The Board heard oral argument on September 16, 2008.

APPEARANCES

James E. Martin, of Overland Park, Kansas, appeared for the claimant. Christopher M. Crank, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition the Board considered the report of board certified orthopedic surgeon Terrence Pratt, M.D. to whom claimant was referred for an independent medical examination (IME) by the ALJ. The parties, at oral argument to the Board, stipulated to the work disability calculations of the ALJ for the periods from March 15, 2006 through November 2, 2006 at 40.18 percent and November 3, 2006 through April 8, 2008 at 51.03 percent. The parties also agreed that the calculations of the ALJ for the period from

November 3, 2006 through April 8, 2008 were incorrect. That time period encompasses 74.57 weeks, instead of the 24.16 weeks used by the ALJ. That error will be corrected in the calculation of this award.

ISSUES

The Administrative Law Judge found that the claimant sustained an accidental injury arising out of and in the course of her employment with the respondent on March 9, 2005 and therefore entitled to the following work disability:

> 40.18 percent work disability for the period of March 15, 2006 to November 2, 2006
> 51.03 percent work disability for the period November 3, 2006 to April 8, 2008 and
> 14 percent permanent partial functional disability commencing April 9, 2008

The parties are satisfied with the Award of the ALJ for the periods of March 15, 2006 to November 2, 2006 and November 3, 2006 to April 8, 2008. No appeal is taken from the Award for the 40.18 percent and 51.03 percent awards during those periods of time.

The ALJ also ordered respondent to pay claimant's outstanding medical expense with Shawnee Mission Medical Center and Providence Medical Center.

The claimant requests review of whether the ALJ erred in his finding of the nature and extent of disability sustained by the claimant and whether the ALJ erred in his award of work disability beginning April 9, 2008. Claimant contends that the Award should be modified to provide for a 57.73 percent work disability based upon a 37.9 percent wage loss and 69.56 task loss effective April 9, 2008.

Respondent argues that the claimant is not entitled to a work disability after April 8, 2008, due to its willingness to accommodate claimant's restrictions, with claimant being returned to work at full-time employment at a comparable wage. Respondent argues claimant's loss of wages after April 8, 2008 was the fault of claimant, based upon poor attendance at her accommodated position. The period after April 8, 2008 is the only part of this Award in dispute.

FINDINGS OF FACT

Claimant worked for respondent as a certified nurses aid (CNA). When claimant was first hired on December 3, 2003, she was hired to work on a full-time basis, working 37-40 hours per week.

On March 9, 2005, claimant injured her low back while transferring a female resident. Claimant tried to continue working but the pain in her back was too severe. Ultimately, claimant underwent surgery by C. Edward Wilson, M.D. involving an L5-S1 microdiscectomy, bilateral partial laminectomies and right partial medial discectomy.

Claimant was restricted from lifting over 20 pounds and was prohibited from repetitive bending or lifting.

Claimant returned to work for respondent on March 15, 2006 at an accommodated position. As noted by the above stipulations, claimant experienced a wage and task loss from this injury which resulted in a work disability of 40.18 percent during this time period. On November 2, 2006, claimant's hours were reduced to 28 hours per week as a result of a work force reduction involving many of respondent's employees. This reduction in hours resulted in an increase in claimant's wage loss under K.S.A. 44-510e and a stipulated work disability of 50.13 percent through April 8, 2008.

Effective April 9, 2008 claimant was returned to work, full-time. She was scheduled to work from 37 to 40 hours per week, at an increased hourly rate of $11.36. Based upon these wages and at a minimum of 37 hours per week, claimant's return to work wage represented at least 90 percent of the wage she was earning on the date of accident.

Claimant was referred by her attorney to board certified orthopedic surgeon Edward J. Prostic, M.D. for an examination on June 24, 2005. Dr. Prostic recommended that claimant remain on light duty. Dr. Prostic next examined claimant on April 10, 2006. At that time, he determined that additional treatment would not be beneficial. He found that claimant had suffered a 15 percent permanent partial whole body functional disability, based on the AMA Guides 4th ed. He agreed with the earlier restrictions and recommended claimant continue working under the same. Dr. Prostic last examined claimant in June, 2007. At that time, he found claimant to have suffered an 18 percent permanent partial whole body functional disability, again based on the AMA Guides, 4th ed. The 20 pound lifting restriction remained. Dr. Prostic agreed that if claimant worked as a receptionist, and was able to get up and move throughout the day, alternating between sitting and standing, she could perform that work within her current restrictions. Dr. Prostic was not asked if claimant was limited in the number of hours she could work.

Claimant was then referred by the ALJ to board certified orthopedic surgeon Terrence Pratt, M.D. for an independent medical examination. Dr. Pratt first saw claimant on November 6, 2006, but was unable to complete his evaluation and report as he had not been provided complete copies of claimant's medical and treatment histories. Upon being provided a complete medical history on claimant, Dr. Pratt recommended a pain management assessment with the possibility of facet blocks. The facet blocks were administered with less than satisfactory results. Claimant returned to Dr. Pratt for a final assessment on May 31, 2007. At that time, he rated claimant at 10 percent impairment to the whole person based on the AMA Guides 4th ed. He recommended claimant not perform frequent low back bending or twisting and limit maximal lifting at 25 pounds occasionally and 10-15 pounds frequently. These restrictions were deemed permanent.

Corinne Lines, respondent's administrator, testified regarding a letter sent to claimant on April 8, 2008 offering her a job. The job was a full-time position, within

claimant's restrictions, as a receptionist at the hourly rate of $11.36 and based on a 40 hour work week. Claimant had total physical mobility, being able to get up any time, move around, get a drink, all as part of the job protocol. Ms. Lines testified that, even though claimant was scheduled full-time, she missed work 1-2 times per week. For the two week period ending on April 9, 2008, claimant worked 60.40 hours. For the period after April 9, 2008, the only evidence of claimant's actual earnings is contained in respondent's Exhibit #1 from the deposition of claimant taken on April 28, 2008. For the two week pay period from April 10 through April 23, 2008, claimant worked a total of 61.6 hours. During these periods, claimant was being paid at the hourly rate of $11.36.

PRINCIPLES OF LAW AND ANALYSIS

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[1]

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90percent or more of the average gross weekly wage that the employee was earning at the time of the injury.[2]

The only issue remaining for the Board's determination is whether claimant is entitled to additional permanent partial disability compensation from and after April 9, 2008 when claimant had been returned to work by respondent at a comparable wage at a job within her restrictions. The ALJ found claimant was limited to her functional impairment as she had been returned to work earning at least 90 percent of her average weekly wage from the date of accident. The majority of the Board disagrees.

In determining what, if any, wage loss claimant has suffered, K.S.A. 44-510e must be read in light of both *Foulk*[3] and *Copeland.*[4] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A.

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[1] K.S.A. 44-510e.

[2] *Id.*

[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the fact finder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[5]

On April 9, 2008, claimant was returned to work as a receptionist, working 40 hours per week at an hourly rate of $11.36. This computes to a post-injury wage of $454.40, which is 99 percent of the average weekly wage of $461.19 claimant was earning on the date of accident. Claimant was not limited by any of the treating or examining physicians to part-time work. Dr. Prostic, claimant's chosen expert opined that claimant could work the receptionist job as long as mobility was part of the package. As noted, Ms. Lines testified to the mobility available to claimant at this position. However, claimant has testified that her return to work has been hampered by pain. She has significant difficulty sitting for long periods of time. This causes her to have to call in sick on a regular basis and to have to go to emergency rooms for pain medication, including morphine shots. The pain comes from spasms in her back and she has problems with her legs giving out.

The Kansas Supreme Court was asked to consider a situation similar to this in *Graham*.[6] In *Graham,* the claimant was a trucker who fell from a truck, injuring his right arm, right leg and neck. After returning to work on more than one occasion in accommodated work, claimant was ultimately required to restrict his work week to 2 or 3 days per week due to pain. Both Dr. Daniel Zimmerman, the claimant's hired physician expert, and Dr. Chris Fevurly, respondent's expert, testified that Graham could return to a 40 hour week, but Dr. Zimmerman stated that claimant's pain could incapacitate him totally. Dr. Fevurly stated that pain could reduce claimant's ability to work from 40 hours per week, down to 20 hours per week. The ALJ in *Graham* found that the claimant had not retained "the capacity to work a normal five day work-week."[7]. With the claimant in *Graham* working only part-time, a wage loss of 24 percent was calculated and used to aid in the determination of the work disability.

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[5] *Id.* at 320.

[6] *Graham v Dokter Trucking Group*, 289 Kan. 548, 161 P. 3d 695 (2007).

[7] *Id.* at 551.

The ALJ was affirmed by the Board in a four to one vote. The one dissenting member argued that the claimant had failed to put forth a good faith effort by not working 40 hours per week in absence of any medical restrictions prohibiting same. The Kansas Court of Appeals agreed with the dissenting Board Member, determining that a wage loss from a workers self-imposed work restriction rather than a medical restriction is not compensable under K.S.A. 44-510e and claimant should be limited to an award based on his functional impairment rating. The Court of Appeals noted that K.S.A. 44-510e(a) contemplates a wage loss must be supported by an opinion of a physician.[8]

The Kansas Supreme Court, in reviewing the decision of the Court of Appeals, noted that both the ALJ and the Board implicitly interpreted K.S.A. 44-510e(a) to require evidence of a physician's opinion only on task loss and not on wage loss. The Supreme Court agreed, finding that the plain language of the statute required a physician's opinion only on the task loss portion. The Court noted statutory interpretation begins with the language selected by the legislature. If that language is clear, then statutory interpretation ends there.

The Supreme Court also compared the Court of Appeals interpretation of the phrase "engaging in work" to "able to earn." The Court stated:

> The panel said the record was insufficient to support claimant's contention that he was "unable to earn" that amount. We see a distinction with impact between the actual "engaging in work" of the statute and the theoretical "able to earn" of the Court of Appeals. Claimant may be theoretically able to earn more, but substantial evidence supports the Board's determination that his actual pain prevents the theory from becoming a reality."[9]

The Court reversed the decision of the Court of Appeals, finding that claimant's pain from his work injury limited his earnings by exerting downward pressure on the number of hours he could work. The Board finds this matter to be strikingly similar to *Graham* in that this claimant, while returned to work at an accommodated job, is limited by her pain to a less than full-time work.

The Board finds that claimant has not been returned to work at a wage 90 percent or more than her average weekly wage on the date of accident. Therefore, claimant is entitled to work disability under K.S.A. 44-510e(a). The Board also finds that claimant's inability to work a full 40 hours per week, being due to her ongoing pain is not due to any bad faith on claimant's part. Instead, it is due to claimant's inability to work full-time with pain. Thus, claimant has made a good faith effort to return to work and under the policies of *Copeland*, claimant's work disability will be calculated based on claimant's actual wage

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[8] *Id.*, 36 Kan. App. 2d 521, 524, 141 P.3d 1192, *rev. granted* (2006).

[9] *Id.*, 289 Kan. 548, 558, 161 P. 3d 695 (2007).

earnings after April 8, 2008. The only evidence regarding claimant's actual wages after April 8, 2008, is contained in respondent's Exhibit #1 to claimant's deposition on April 28, 2008. Claimant actually worked 61.6 hours in the two weeks after April 8, 2008. This averages to 30.8 hours per week. At $11.36 per hour, this calculates to $349.89 per week. When compared to claimant's pre-injury average weekly wage of $461.19, claimant's wage loss calculates to 24 percent. The only task loss in this record is that of Dr. Prostic showing a loss of 69.56 percent. When averaged with claimant's wage loss, this calculates to a work disability of 46.78 percent. The Board finds claimant's work disability after April 8, 2008 is 46.78 percent.

CONCLUSION

Effective April 9, 2008, claimant has a permanent partial work disability of 46.78 percent. Claimant has put forth a good faith effort to retain her job with respondent. The fact that claimant is unable to work a full 40 hour week on a regular basis, due to her ongoing pain, is unfortunate, but does not defeat her right to a work disability under K.S.A. 44-510e(a).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated June 18, 2008, is modified to award claimant 74.57 weeks permanent partial disability compensation for the period from November 3, 2006 through April 8, 2008. Thereafter, claimant is entitled to a permanent partial work disability of 46.78 percent.

Claimant is entitled to 20.71 weeks of temporary total disability compensation at the rate of $307.48 per week or $6,367.91 followed by 33.14 weeks of permanent partial disability compensation at the rate of $307.48 per week, in the amount of $10,189.89 for a 40.18 percent work disability, followed by 74.57 weeks of permanent partial disability compensation at the rate of $307.48 per week in the amount of $22,928.78, through April 8, 2008, for a 51.03 percent work disability, followed by 63.05 weeks of permanent partial disability compensation at the weekly rate of $307.48 in the amount of $19,386.61, representing a 46.78 percent permanent partial work disability, for a total award of $58,873.19.

As of October 21, 2008, claimant is owed 20.71 weeks of temporary total disability compensation at the rate of $307.48 or $6,367.91 followed by 135.71 weeks of permanent partial disability compensation at the rate of $307.48 totaling $41,728.11 for a total due and owing of $48,096.02 which is ordered paid in one lump sum minus amounts already paid. Thereafter, claimant is owed 35.05 weeks of permanent partial disability compensation at the weekly rate of $307.48 until fully paid or until further order of the Director.

In all other regards, the Award of the ALJ affirmed in so long as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this _____ day of October, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Christopher M. Crank, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge